of any event or contingency connected with a public lottery or buys a lottery ticket, shall be liable to a fine not exceeding twenty-five dollars.

(2) A person in whose possession a lottery ticket is found shall be presumed, until the contrary is proved, to have bought the same.

(3) Every lottery ticket brought or introduced into or being within the Colony shall be forfeited to the Crown, and it shall be the duty of every police officer or other public servant to seize every such ticket wherever found.

Dealing with the first point, there was definite and unrebutted evidence that the betting slips found on the accused were lottery tickets. Under sub-section (2) the presumption arose that the accused had bought and paid for them, until the contrary was proved. There was, therefore, a *prima facie* case against the accused under sub-section (1).

Section 4(a) and (b) and section 6 refer to gaming house and have nothing wnatsoever to do with lotteries, except as regards a gaming house being used for the purpose of a public lottery. Similarly the presumptions set out in sections 14 and 15 only apply to gaming houses where a search warrant has been issued and such fact is in evidence (unless a Justice of the Peace himself enters the house and gives evidence to such effect). The presumption in section 7(2) has no reference to any search warrant and arises when lottery tickets are found on an accused, as in this case.

In my opinion the learned Magistrate erred in this respect and should have called on the accused for his defence. In effect section 7(1) says that "any person who either personally or by an agent ...." buys a lottery ticket, shall be liable to a fine of $25.00. Section 7(2) says that any person in whose possession a lottery ticket is found (and nothing is said about a search warrant) shall be presumed, until the contrary is proved, to have bought the same.

The accused has been acquitted and discharged and I think that, as set out above, the learned Magistrate erred in not calling on him for his defence. What that defence would have been is only a matter of conjecture and it is not for me to advise as to what evidence might have rebutted the presumption that had arisen against him.

Under the circumstances I make no order apart from reversing the determination in respect of which the Special Case has been stated.

No order

CHOP NGOH SENG v. ESMAIL & AHMAD BROS.

[O. C. J. (Gordon-Smith Ag. C.J.) October 27, 1948]

[Singapore — Civil Suit No. 190 of 1947]

Contract — Sale of specified goods — Subject matter of contract not in existence — Impossibility of performance.

In this case the plaintiffs claimed the refund of $6,000 being a deposit paid by them on account of the purchase price of fifty bales of gunny bags. The parties had entered into a written contract for the supply of fifty bales of gunny bags to be delivered per s.s. "Mausang," due in Singapore on or before a specified date. When the s.s. "Mausang" which in fact sailed from Calcutta the day after the contract was signed, arrived in Singapore, the fifty bales of gunny bags were not on board. Neither party to the contract was aware of this fact at the time the contract was entered into.

Held: the contract in this case was for the sale of specified goods on a specified ship arriving at Singapore on or about a specified date and as the goods were not on board the ship, the contract was impossible of performance and was therefore void.

Case referred to:—

(1) *Barrow v. Phillips* (1929) 1 K.B. 574.

CIVIL SUIT.

H. R. Wilson for the plaintiffs.

D. Murphy for the defendants.

Cur. Adv. Vult.

The facts sufficiently appear from the judgment.

Gordon-Smith Ag. C.J. : — In this suit by their statement of claim, the plaintiffs claimed the refund of $6,000 being a deposit paid by them on account of the purchase price of $30,000 in respect of fifty bales of gunny bags, a written contract of sale having been entered into on the 24th May, 1947.

As the whole issues are bound up with the terms of this written contract as to whether the same had been avoided or whether there had been a breach thereof by the plaintiffs, it is necessary to examine the terms of the contract closely. The defendants had counterclaimed for $4,400 damages for breach of contract.

The contract is dated the 24th May, 1947 and is embodied in a printed form with addition in manuscript and rubber stamps. It is signed by the parties and sets out the relevant price of the goods and specifies the same, the receipt of the $6,000 deposit is acknowledged and payment was to be in cash. There is no dispute arising as to terms of the contract.

Under the "Remarks" heading there is written "shipment ex s.s. Mausang from Calcutta expected here on or about 6th June, 1947. Buyers are bound to take delivery if shipment delayed and arrived late".

Under this there are three conditions, completed also in manuscript as underlined herein, as follows :—

"(1) Subject to safe arrival per s.s. "Mausang" from Calcutta.

(2) Delivery to be taken within two or three days from date of arrival here.

(3) Delivery to be taken at Sellers' godown Deposit $6,000 cheque No. .....

No claim will be accepted after taking delivery."

Then follows a "N. B." clause which appears to be neither relevant nor applicable to the terms of the contract and was not mentioned in argument. I therefore disregard it, but inserted below this clause in manuscript is "other conditions as per reverse". Then follows a printed clause as follows :—

Any act of war, mobilisation, strike, scarcity of tonnage, shutout or delay caused by the mill which affects the shipments, the sellers are not responsible for the delay caused by them, and the buyers will take delivery of goods on arrival, although late.

On the reverse of the contract there are a further nine conditions imposed by rubber stamps none of which is relevant except possibly two.

Agreed correspondence was put in from which it appears that the plaintiffs' soliciters wrote on the 5th June to the defendants to the effect that the s.s. Mausang had arrived at Singapore on the 3rd June and that the defendants had committed a breach of the said contract and claimed a refund of the $6,000 paid. In reply the defendants wrote drawing attention to the War Condition, set out above, and that owing to the disturbed conditions in Calcutta apparently the goods had been "shut out" from the s.s. "Mausang" and the goods were being shipped by the earliest possible boat thereafter, alternative shipping having been secured. The writ was issued on the 10th June. Actually the goods arrived on the 17th June, 1947 by the s.s. Taksang and the plaintiffs refused delivery. Subsequently the defendants sold the goods, and the market price having dropped, they only realised $19,600, and after giving credit for the $6,000 deposit, the defendants counterclaimed for the balance $4,400 as damages for breach of contract, in the defence and counterclaim filed on the 9th July.

In the reply and defence to the counterclaim, the plaintiffs pleaded one of the rubber stamped conditions endorsed on the contract as follows : — "Should a political situation arise as a consequence of which our suppliers are prevented from shipping the goods this contract is to be null and void" and it was claimed that the condition of the contract as regards shipment were never carried out and that the contract was discharged, alternatively that the contract was null and void in terms of the above quoted condition.

A large amount of evidence was taken on commission at Calcutta on the application of the defendants and is of little value as regards the real issues in the case but it is to be noted that the s.s. Mausang sailed from Calcutta on the 25th May, the day after the contract had been entered into in Singapore and that it arrived in Singapore on the 3rd June, but without any of the gunny bags, the subject matter of the contract, on board. There was, however, a considerable number of bales of gunny bags on board destined for Penang, Singapore and other places and consigned to other people and also goods of other description consigned to the defendants.

In the first place the question is wholly one of construction of the contract. Although a printed form of contract with blanks to be filled in manuscript, it is in the form of a regular contract. It is dated, signed and the subject matter of the contract is clearly specified and the price stated, a considerable deposit having been paid. The date of delivery of the goods is also specified with provision for some delay in delivery if the ship is itself delayed.

What in actual fact was the subject matter of the contract? In my opinion it is clear that it relates to fifty bales of gunny bags on board the s.s. Mausang which is expected in Singapore about the 6th June. Actually the ship sailed from Calcutta the day after the contract was signed in Singapore and it arrived in Singapore earlier than was expected, namely on the 3rd June, but the fifty bales, the subject matter of the contract, was not on board and never had been. There were, in fact, over five thousand bales of gunny bags on board the s.s. Mausang consigned from Calcutta to various persons at various ports, including Singapore, but those fifty bales, the subject matter of the contract, were not on board and neither party to the contract was aware of this fact at the time the contract was entered into. In other words, the subject matter of the contract of sale did not exist at the time the contract was entered into but neither of the contracting parties was aware of such fact at the time. The contract was impossible of performance and was therefore void. It is analogous to goods perishing before sale but after agreement for sale, specifically provided for in section 7 of the Sale of Goods Act, 1893.

It was not a contract for the sale of gunny bags to be shipped at some future time at Calcutta either by the s.s. Mausang or by any other vessel but a contract for sale of specified goods on a specified ship arriving at Singapore on or about a specified date; see also condition (1), the contract was "subject to safe arrival of our goods per s.s. Mausang from Calcutta". The goods never did arrive on board the s.s. Mausang because they were never on board.

The law is quite clear on the point where the contract can be construed, as I so construe it. See *Leake on Contracts*, 8th Edition, pages 516, 517, and the authority there quoted, namely *Barrow v. Phillips*[1], and particularly Wright, J.'s remarks on pages 583, and 584. The facts in this case, although somewhat similar, were far more complicated.

This really concludes the matter and I hold that the contract was void for the reasons stated and it is unnecessary to consider other conditions on the contract.

It follows that the deposit must be refunded and there will be judgment for the plaintiffs on the claim and on the counterclaim, with costs.

Judgment for the plaintiffs.

Solicitors: *Battenberg & Talma; Chan, Laycock & Ong*

Re CARLTON A. HIRE.

[O. Cr. J. (Gordon-Smith Ag. C. J.) November 3, 1948]

[Singapore — Originating Motion No. 73 of 1948]

Criminal Procedure Code (Cap. 21), s. 386 — Application for Writ of Habeas Corpus — Application on behalf of a mere stranger or volunteer — Detention of British subject on foreign territory.

In this case an application was made for an order for the issue of a writ of *habeas corpus* to bring before the Court one Carlton Arthur Hire. It appeared that the said Carlton Arthur Hire was detained by the Dutch in the Netherlands East Indies. The application was made on the instruction of one Ivy Taye who was not shown to have any authority to appear on behalf of Carlton Arthur Hire or to represent him.

Held: the applicant in this case was a mere volunteer or stranger and therefore not entitled to the issue of a writ of *habeas corpus* on the facts before the Court.

[**Editorial Note:** Section 386 of the Criminal Procedure Code (Cap. 21) has been repealed and re-enacted by section 375 of the Criminal Procedure Code (Cap. 132).]

Case referred to:—

(1) *In re Ning Yi-Ching & Ors.* 56 T.L.R. 3.

APPLICATION for writ of *habeas corpus.*

S. H. D. Elias for the applicant.

Gordon-Smith Ag. C.J. : — This is an application by way of motion by Mr. Elias for an Order for the issue of a writ of *habeas corpus* directed to Mr. Minns, an Assistant Commissioner of Police, and to the Commissioner of Police, to bring before the Court one Carlton Arthur Hire for the purpose of enquiry concerning him.

It is supported by an affidavit of the 25th October, 1948, by one Ivy Taye to which affidavit there are exhibited correspondence between Mr. Elias and the Attorney-General's office and also various press reports.

The application is made under Chapter XXXIII, section 386 of the Criminal Procedure Code which reads as follows:—

"386. Any person —

(a) who is detained in any prison within the limits of the Colony on a warrant of extradition whether under the Extradition Acts, 1870 and 1873, or under the Fugitive Offenders Act. 1881; or

(b) who is alleged to be illegally or improperly detained in public or private custody within such limits; or

(c) who claims to be brought before the Court to be dealt with according to law;

may apply to the High Court for a writ of *habeas corpus*" and it is under paragraph (c) that the application is made.

At the outset of Mr. Elias's argument I intimated that I should have to be satisfied, before ordering even a rule *nisi* to issue, in respect of two points:—

Firstly, that the application was properly before the Court, and as to who was making the application, and I quoted 9 *Halsbury*, 2nd Edn., p. 721 para. 1229, as follows: "A mere stranger or volunteer, however, who has no authority to appear on behalf of a prisoner or right to represent him will not be allowed to apply for *habeas corpus*", and see cases quoted thereon.

Secondly, that any order the Court might make could be effective.

As regards the first point, the affidavit is made by Ivy Taye who describes herself as a close friend of Carlton Arthur Hire and it is she, according to the affidavit, who has instructed Messrs. Elias Brothers who have initiated these proceedings, as specifically stated both in the affidavit and in the correspondence.

It is true that the formal notice of motion stands in the name of Mr. Elias "of counsel for the above-named Carlton Arthur Hire", but there is no doubt, and can be no doubt, that the proceedings have been initiated by the said Ivy Taye.

Is she, therefore, "a mere stranger or volunteer"?